(24)

No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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A casual reader of the briefs filed by Schumer and his *amici* might suppose that the question presented here is whether fraud against the Government is good or bad. That is obviously not so. Rather, the question is whether the Ninth Circuit erred by extending the False Claims Act beyond all bounds of language and logic, transforming a well-intentioned statute into an instrument of abuse. Although Schumer takes pains to distance himself from the opinion below and to divert attention from the facts at hand, his interpretation of the statute is both implausible in theory and unworkable in practice.

I. SCHUMER'S RETROACTIVITY ANALYSIS IS WRONG.

A. At the broadest level, Schumer suggests that the traditional presumption against retroactivity does not apply here because the 1986 amendments to the FCA's *qui tam* bar neither (1) prohibited previously lawful conduct, nor (2) increased the penalty for unlawful conduct. *See* Resp. Br. at 15. That sweeping suggestion (echoed by the United States, *see* U.S. Br. at 16-17) is incorrect. The presumption against retroactivity applies to all statutes that alter the "legal consequences" of conduct. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). There is no basis in principle or precedent for limiting the "legal consequences" of conduct to Schumer's two discrete categories. To the contrary, the *Landgraf* Court expressly rejected any such "mechanical" approach. *Id.* at 1498. Many laws that do not fall into either category—including those that eliminate defenses such as statutes of limitations or contributory negligence—have long been recognized to fall within the scope of the presumption. *See* Pet. Br. at 22; *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 302 (1913).

B. Schumer's retroactivity argument thus boils down to the proposition that there is no relevant difference between enforcement of the law by the Government and by private parties. *See* Resp. Br. at 17-18. That proposition is untenable. "[A] suit by a private party is obviously quite different from the government's direct enforcement of its own laws." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777

(1986). The difference is one not merely of degree, but of kind. Private *qui tam* relators act "under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 541 n.5 (1943) (internal quotation omitted). They have only one goal: to maximize their bounty. The Government, in contrast, must take into account the broader public interests at stake. *See* Pet. Br. at 17. The Government's vast array of enforcement powers also enables it to enforce any particular law with a degree of flexibility and discretion that a private party cannot. *See e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 60-61 (1987). Public law enforcement, thus, has long been governed by different legal rules than private law enforcement. *See, e.g., Wyatt v. Cole,* 504 U.S. 158, 168 (1992); *INS v. Hibi,* 414 U.S. 5, 8 (1973) *(per curiam).* A statute subjecting a defendant to suit by private parties differs in both fact and law from a statute subjecting the defendant to suit by the Government alone.

The facts of this case well illustrate the point. The Government investigated the underlying allegations of wrongdoing at great length. That investigation persuaded government officials that no FCA action was either necessary or appropriate; a technical noncompliance with accounting disclosure requirements did not then (and does not now) warrant sanctions. *See* 4 C.F.R. § 331.71(b)(2) (1982); 48 C.F.R. § 30.602-2(d)(3) (1996). Accordingly, the professional law enforcement authorities who reviewed this lawsuit declined to intervene. *See* J.A. at 103-05. It is hard to imagine a more compelling example of the fundamental distinction between private and public enforcement of the law; this case would not *exist* but for the 1986 amendments expanding private enforcement of the FCA. Schumer thus misses the point by declaring that those amendments cannot be distinguished from laws increasing the *Government's* enforcement powers. *See* Resp. Br. at 18.

Retroactive application of the amended *qui tam* bar, indeed, would unfairly defeat the expectations of regulated parties. Before 1986, contractors had less incentive to devote resources to preventing the sort of technical transgressions alleged here. *Cf. Landgraf,* 114 S. Ct. at 1506 n.35. Under settled regulatory understandings, the Government would not bring an FCA action based upon such technical transgressions, and a contractor could preclude frivolous *qui tam* suits by voluntarily disclosing actual or potential contract irregularities to the Government. *Cf. Gwaltney,* 484 U.S. at 60-61.

Schumer errs, then, by contending that a new law subjecting a defendant to lawsuits by *everyone* has no "legal consequences" as long as that defendant previously could have been sued by *someone*. A new or expanded private right of action should not be applied to past conduct in the absence of a clear indication that "Congress itself has affirmatively considered the potential unfairness . . . and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf,* 114 S. Ct. at 1501.

C. The United States (but, notably, not Schumer) argues that this case raises no retroactivity issue because the 1986 FCA amendments regulate only "the conduct of *qui tam* litigation" rather than "the primary conduct" that is the subject of such litigation. U.S. Br. at 16. The United States thus seeks to place this case within the line of precedent holding that courts generally apply new rules of *procedure* in all pending and future cases, regardless of whether the underlying conduct preceded the rules' enactment. *See, e.g., Landgraf,* 114 S. Ct. at 1502 & n.29.

The short answer to this argument is that the amended *qui tam* bar is *not* a rule of procedure. That provision does not govern "the *manner* in which litigation is conducted," U.S. Br. at 10 (emphasis added), but whether such litigation can be filed in the first place. The point of expanding private enforcement of the FCA was to regulate not the litigation conduct of FCA *plaintiffs*, but rather the underlying conduct of FCA *defendants*.

For retroactivity purposes, thus, the relevant—or "primary"—conduct is not the act of filing a *qui tam* lawsuit, but instead the conduct on which that lawsuit is based. *See Landgraf*, 114 S. Ct. at 1502; *id.* at 1524-26 & n.3 (Scalia, J., concurring in judgment); *cf.* Pet. Br. at 16 n.4.

Indeed, the United States (and, for that matter, Schumer) concedes that the fact that the amended *qui tam* bar is phrased in "jurisdictional" terms does not negate the presumption against retroactivity. *See* U.S. Br. at 14-15; Resp. Br. at 16 n.12. Because the purpose of the amendment, like the purpose of a statute expanding "jurisdiction" to award punitive damages, was to promote the detection, deterrence, and punishment of wrongdoing, the amended bar should not apply in cases challenging past conduct. *Cf. Landgraf*, 114 S. Ct. at 1505-06. Fixation on the magic word "jurisdiction" is no substitute for analysis of the amendment's substantive import.

II. SCHUMER'S INTERPRETATION OF "PUBLIC DISCLOSURE" IS WRONG.

A. Schumer next asserts that, as a matter of law, no "public disclosure" occurs within the meaning of the post-1986 *qui tam* bar unless the Government or the news media discloses the relevant allegations or transactions to "*any and all* members of the public." Resp. Br. at 9, 21 (emphasis added); *see also id.* at 25, 28 ("public disclosure" requires disclosure to "the public at large"). Even the Ninth Circuit did not go nearly so far;[1] indeed, Schumer can cite *no court* that has so interpreted the statute. Under Schumer's interpretation, the amended *qui tam* bar authorizes not only "whistleblower" actions that bring to light previously undisclosed fraud, but also "parasitic" actions based on information previously disclosed by the Government. That interpretation is not only unsupported by the text, history, or purpose of the statute, but is unworkable in practice.

[1] The Ninth Circuit held only that no "public disclosure" occurs when the Government discloses allegations of wrongdoing to a contractor's "innocent employees." *See* Pet. App. at 8a-11a.

1. Schumer's textual analysis is superficial at best. He begins—as he must—by conceding that the term "public disclosure" is not self-defining, but "'susceptible to a range of plausible meanings.'" *See* Resp. Br. at 20 (quoting Pet. Br. at 25); *see also id.* at 30. He gives no reason, however, why the text supports his particular interpretation. Indeed, he fails to address the most glaring textual flaw in his argument: the *qui tam* bar does not refer to "public disclosure" in the abstract, but rather to "public disclosure" from several specified sources, *many—if not most—of which are not disseminated to "any and all members of the public."* *See* Pet. Br. at 25. It is implausible, to say the least, that Congress meant to require the disclosure of information to "the public at large" while specifying particular sources of information—such as government "audits" or "investigations"—that are *not* disclosed to the public at large.

In contrast, Hughes' interpretation of "public disclosure" takes into account the term's statutory context: a "public disclosure" occurs when information from one of the specified sources is disclosed to a member of the public with no prior knowledge thereof (*i.e.*, a "stranger to the fraud"). *See* Pet. Br. at 25-26; *see also United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992). The sum and substance of Schumer's textual argument consists of two feeble challenges to that interpretation.

First, Schumer argues that Hughes' interpretation of "public disclosure" is "unprincipled" because it is limited to disclosure to "'members of the public *with no prior knowledge* [of the alleged wrongdoing],' *viz.*, to 'strangers to the fraud.'" Resp. Br. at 34 n.22, 33 (quoting Pet. Br. at 25-26). Indeed, Schumer chides Hughes for "never deign[ing] to explain why, on its view of the law, communications with those particular individuals within a corporate organization who have prior knowledge do not constitute 'public disclosure' whereas communications with 'strangers to the fraud' do." *Id.* at 34. But the explanation is implicit in the language of the statute: a

"public disclosure" occurs only when information is revealed to a member of the public with no prior knowledge thereof because a "disclosure" occurs only when information is revealed to someone who does not already know it. *See, e.g.*, Webster's Third New International Dictionary 645 (1976) (defining "disclose" as "to make known" or "to divulge"). An alleged fraud simply cannot be "disclosed" to a member of the public who already knows about it. *See, e.g., EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 603 (1981); *id.* at 607 (Stevens, J., dissenting).

Second, Schumer argues that Hughes' interpretation "treat[s] all disclosure as *ipso facto* public," and thereby renders superfluous the word "public." *See* Resp. Br. at 9, 21-22. Schumer is wrong. The word "public" establishes that a disclosure *within* the Government will not bar a *qui tam* action; "one government employee telling another government employee is not *public* disclosure." *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) (emphasis added). Thus, the mere disclosure of a particular allegation or transaction in a government audit or investigation is not a *public* disclosure; the statute requires disclosure of such an allegation or transaction to a member of the public. The canon that a court should try to give every word in a statute *some* meaning does not require a court to give every word its *broadest possible* meaning. *Cf. Walters v. Metropolitan Educ. Enters., Inc.*, 65 U.S.L.W. 4059, 4061 (U.S. Jan. 14, 1997).[2]

2. After his brief dalliance with the statute's text, Schumer quickly retreats to its legislative history in search of support for his unprecedented interpretation of the *qui tam* bar. *See* Resp. Br. at 22-25. But that history is no more helpful to his cause.

[2] Schumer makes no effort to address Hughes' textual argument that his interpretation of "public disclosure" in the *qui tam* bar would render absurd an identically-worded provision in the Major Fraud Act, 18 U.S.C. § 1031(g)(2)(C). *See* Pet. Br. at 32-33.

Schumer is unable to extract from the extensive history *any* statement—whether from a committee report or even from an individual legislator—endorsing his view that "public disclosure" requires disclosure to "any and all members of the public." Rather, Schumer concocts an elaborate theory based on inferences drawn from the twists and turns of the legislative drafting process. That theory should be rejected not only because it is improper to construe a statute based upon such speculative inferences, but also because other portions of the legislative history directly refute it.

Although the Members of this Court have expressed differing views about the proper role of legislative history in statutory interpretation, *compare Conroy v. Aniskoff*, 507 U.S. 511, 518 n. 12 (1993) *with id.* at 518-19 (Scalia, J., concurring in judgment), it is common ground that some forms of legislative history are less reliable indicia of congressional intent than others. Statements in floor debates, for example, are substantially less reliable than statements in committee reports. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). Perhaps the *least* reliable form of legislative history is the form on which Schumer relies—mere inferences from the drafting history of a bill, unsupported by any contemporaneous explanation of the reason for the insertion or deletion of particular words. Schumer's convoluted and speculative theory represents the very misuse of legislative history that tends to bring the entire venture into disrepute.

Schumer cites no statement in the legislative history even *hinting* that the word "public" was added to limit the *qui tam* bar to actions based upon information disclosed to the "public at large." To the contrary, Senator Grassley, sponsor of the bill and author of the *qui tam* bar ultimately enacted into law, indicated that he perceived *no* distinction between a "disclosure" and a "public disclosure." He was also the author of a provision (which ultimately became 31 U.S.C. § 3730(d)(1)) limiting the recovery of "original sources" in *qui tam* actions taken over by the Government. This "knock

down" provision mirrors the language of the *qui tam* bar, except that it does not include the word "public" before the word "disclosure." *Compare* 31 U.S.C. § 3730(e)(4) *with id.* § 3730(d)(1). Nonetheless, Senator Grassley stated that both provisions apply to actions based on "publicly disclosed" information, attributing *no* meaning to the use of the adjective "public" in the one subsection but not the other.[3] Schumer's fanciful theory that the meaning of the *qui tam* bar can be derived from the appearance of the word "public" in the final stages of the drafting process thus collides head-on with the contemporaneous statements of the very legislator responsible for the changes.[4] It is hardly surprising, accordingly, that no analyst of the legislative history has ever before drawn Schumer's speculative inferences from the drafting process.[5]

[3] Senator Grassley described the interplay between the two provisions as follows: "When the *qui tam* plaintiff brings an action based on *public information*, meaning he is an 'original source' within the definition under the act, but the action is based primarily on *public information* not originally provided by the *qui tam* plaintiff, he is limited to a recovery of not more than 10 percent. In other words, a 10-percent cap is placed on those 'original sources' who bring cases based on information already *publicly disclosed* where only an insignificant amount of that information stemmed from that original source." 132 Cong. Rec. at 28,580 (Oct. 3, 1986) (statement of Sen. Grassley) (emphasis added); *see also id.* at 20,536 (Aug. 11, 1986) (statement of Sen. Grassley); *cf. id.* at 29,322 (Oct. 7, 1986) (stating that § 3730(d)(1) applies only to original sources).

[4] Schumer's theory also fails on its own terms. It is premised on the self-serving assumption that all of the sources of information listed in the *qui tam* bar before the insertion of the word "public"—such as Government Accounting Office reports and administrative hearings—"by their very nature" involve disclosure to the public at large, whereas those added later do not. Resp. Br. at 24. That assumption has no basis in law or fact.

[5] To the contrary, commentators who have carefully analyzed the legislative history agree with Hughes that "public disclosure" means disclosure to a member of the public who is a stranger to the fraud. *See* Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 250-57, 261-62 (continued...)

3. Having failed to find support for his interpretation of the *qui tam* bar in the FCA's text or history, Schumer next resorts to the statute's "underlying policies." Resp. Br. at 25. Here again, his efforts are in vain.

Schumer contends that the point of the *qui tam* bar is not to preclude "parasitic" lawsuits, but instead to "generate pressure on the Executive Branch to respond to . . . allegations [of wrongdoing] with vigor, and mak[e] lack of vigor a matter for public censure." Resp. Br. at 28. That contention is far-fetched at best. The FCA is not an ethics-in-government act. If Congress had been concerned about dishonesty or sloth in the Executive Branch, it surely could have addressed those problems in a more direct and effective way than authorizing a windfall for "parasitic" *qui tam* relators.[6]

The main problem with Schumer's theory, thus, is that it fails to explain why Congress would have wanted to authorize "parasitic" *qui tam* actions except when based upon information disclosed to "any and all members of the public." It is not "any and all members of the public" who typically file *qui tam* actions, after all, but rather those members of the public—particularly the employees of government contractors—who have specialized knowledge about a contractor's practices. The FCA's *qui tam* enforcement

[5](...continued)
(1995); Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 Pub. Cont. L.J. 477, 481-91, 506-11, 513 (1995).

[6] Schumer also makes the uncontroversial point that Congress was concerned about the Justice Department's resources, *see* Resp. Br. at 26-27, but that concern in no way supports his interpretation of the *qui tam* bar. Scrutiny of the Justice Department by "the public at large" might help prevent official dereliction of duty, but would not remedy a lack of resources. If Congress had been primarily concerned with increasing private enforcement of the FCA, rather than preventing "parasitic" actions, it would simply have abolished the *qui tam* bar outright. Instead, Congress retained the *qui tam* bar and enacted the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. § 3801 *et seq.*, which authorized federal agencies to pursue administrative remedies against fraud.

mechanism creates a monetary incentive for such private "whistleblowers" to expose fraud against the Government, not a windfall for "parasitic" relators who seek to capitalize on allegations of wrongdoing already disclosed by the Government or news media. *See, e.g., United States ex rel. Findley v. FPC-Boron Employees' Club*, 1997 WL 24258, at *8 (D.C. Cir. Jan. 24, 1997); *Doe*, 960 F.2d at 322. Once the Government is on the trail of an alleged fraud—as evidenced by disclosure to a member of the public of the underlying allegations or transactions from one of the sources specified in the statute—a spin-off *qui tam* action contributes nothing of value.[7] The *qui tam* bar thus precludes such "parasitic" actions unless the relator is an "original source" of the information, *i.e.*, a "whistleblower."

Schumer asserts that Hughes' interpretation of the *qui tam* bar would in effect "reimpose" the "government possession" standard replaced in 1986 by the "public disclosure" standard. *See* Resp. Br. at 28. That assertion is baseless. The Government possesses vast amounts of information, much of which it may not understand or even know about. Congress relaxed the "government possession" standard in 1986 to prevent the mere presence of information in government files—unaccompanied by any investigatory or enforcement efforts—from precluding a *qui tam* suit based on that information. *See* Pet. Br. at 28-29, 33-34; *Findley*, 1997 WL

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[7] The United States explains this point well in its brief: "In the circumstances specified in the statute—particularly where there has been a public disclosure through specified types of government reports and actions—it is likely that the government is already investigating the matter, or appropriate government investigatory personnel have sufficient information to trigger an investigation. Unless the relator is an 'original source,' *qui tam* lawsuits brought in these circumstances—after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action—are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands." U.S. Br. at 19-20 n.12.

24258, at *9. The "public disclosure" standard ensures that government *inaction* will not bar an otherwise valid *qui tam* lawsuit.[8] There is nothing, however, to suggest that the "public disclosure" standard was meant to abolish the traditional bar against "parasitic" *qui tam* actions. To the contrary, courts and commentators agree that the "public disclosure" bar preserves the FCA's traditional (and commonsense) distinction between "whistleblower" and "parasitic" actions. *See* Pet. Br. at 31.

In the final analysis, Schumer's "purpose" theory consists of nothing more than platitudes about the Government's need to enlist the assistance of private parties in the fight against fraud. *See* Resp. Br. at 25-27. That discussion may help explain why Congress chose to enact the FCA's extraordinary *qui tam* enforcement mechanism in the first place, but it fails to explain why Congress would have chosen to authorize *qui tam* actions not only by relators who blow the whistle on fraud but also by opportunists who seek to give the whistle "a second toot." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

4. Finally, Schumer's theory that "public disclosure" requires disclosure to "any and all members of the public" or to "the public at large" is wholly unworkable in practice. Schumer indulges in gargantuan understatement when he admits that his theory fails to clarify "the precise metes and bounds of 'public disclosure.'" Resp. Br. at 9, 21. He does not even *begin* to explain what disclosure to "any and all members of the public" or to "the public at large" entails as a real-world matter. Just how broadly must such information be disseminated? Presumably, Schumer would not require the

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[8] Schumer insists that his interpretation of "public disclosure" is necessary to guard against "the danger that the Government will *fail to act* and that its *inaction* will go unnoticed." Resp. Br. at 28 (emphasis added). But Congress addressed this danger not by requiring disclosure to "the public at large," but by requiring "public disclosure" of information from a source (*e.g.*, an "audit" or "investigation") indicating that the Government is "on the trail of the alleged fraud without [a relator's] assistance." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995).

Government to send out a nationwide mailing of its audit reports or investigations. But he never discloses just how "public" the requisite "public disclosure" must be to satisfy his theory, other than to insist that disclosure to any member of the public (as Hughes advocates) is not "public" enough.[9]

It is unlikely at best that Congress would have established such an open-ended standard to govern the threshold inquiry into a relator's authority to bring a *qui tam* action at all. In interpreting the "public disclosure" bar, thus, the lower courts have recoiled from any attempt to "evaluate the quality and quantity of information in the public domain." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996). The reason is obvious: "courts should not be compelled to have 'a trial before the trial' on how 'public' the information is." Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 265 (1995). In contrast to Hughes' workable, bright-line rule, Schumer's theory would saddle the courts with the unenviable task of determining just how "public" a particular "disclosure" had been, without any intelligible principle to govern that intractable inquiry.

Although it is hard to discern what Schumer means by disclosure to "the public at large," it is clear at the very least that his theory does *not* include disclosure to a government contractor's "innocent employees." As a practical matter, thus,

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[9] Schumer appears to concede that *actual* disclosure to the public at large is not necessary, as long as the relevant information is "*open* to the public at large." Resp. Br. at 9, 21, 25, 27-29 (emphasis added). He does not, however, explain (1) what it means for information to be "open" to "the public at large," or (2) how the mere availability of information (*e.g.*, in "any repository of documents or records open to the general public," Resp. Br. at 29) corresponds with his theory that the purpose of the "public disclosure" bar is to ensure active public scrutiny of Executive Branch officials.

his theory leads to the same result as the Ninth Circuit's theory: it would allow a contractor's employees to file "parasitic" *qui tam* suits at will based on information disclosed by the Government during an audit or investigation. *See* Pet. Br. at 36-37. If either theory were accepted, every government audit or investigation would likely spin off its own "parasitic" *qui tam* action, thereby rewarding opportunistic relators at the expense of the public fisc.[10]

B. In a fallback argument, Schumer acknowledges that a "public disclosure" can entail disclosure to even a single member of the public, but adds the caveat that any such disclosure must be made to that person "*as a member of the public.*" Resp. Br. at 9, 21, 32 (emphasis added); *see generally id.* at 30-33. While this position is less ambitious than his principal argument, it is also less coherent in theory and less workable in practice. It does, however, allow Schumer to arrive at the Ninth Circuit's result without endorsing the Ninth Circuit's reasoning: disclosure to a contractor's employees fails to qualify as a "public disclosure" not because (as the Ninth Circuit asserted) such employees are "unrealistic" *qui tam* relators, but instead because such disclosure is made to those employees "*qua* employees" and not "*qua* members of the public." *Id.* at 30.

This fallback argument is so flimsy that it defies coherent articulation. Information is not disclosed to a member of the public "*qua* member of the public," Schumer asserts, if it

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[10] Schumer attempts to make his theory more palatable by emphasizing that a relator's recovery is capped at 10% (and may be eliminated altogether) in a case based primarily on the disclosure of information from one of the sources specified in the *qui tam* bar. *See* Resp. Br. at 38 (citing 31 U.S.C. § 3730(d)(1)). But that provision applies only in the rare case where (1) the Government intervenes in the action, and (2) the relator is an "original source," *see supra* pp. 7-8 and note 3. If anything, Congress' decision to limit the recovery of "original sources" in the most meritorious cases (those in which the Government intervenes) refutes the suggestion that Congress intended to authorize a plenary recovery for "parasitic" relators in the weakest cases (those in which the Government declines to intervene).

involves "communications between two parties who have a *particular kind* of on-going relationship about matters *within the scope* of that relationship and as an *integral part* of that relationship." Resp. Br. at 30 (emphasis added); *see also id.* at 21 (member of the public not member of the public *as such* when employed by "an entity with whom *[sic]* the Government has a *special relationship"*) (emphasis added); *id.* at 32 (member of the public not member of the public *as such* when "he or she has *some special capacity*" or a "*protected relationship*" with the Government) (emphasis added).

To state this argument is to refute it. The very notion of distinguishing a member of the public from a member of the public "*as such,*" Resp. Br. at 32 (emphasis added), is absurd. And whatever the meaning of this ill-defined argument in *theory*, it clearly does not provide courts with anything approaching a workable standard to apply in *practice*.

The United States advances a related argument. While purporting to endorse Hughes' interpretation of the *qui tam* bar, *see* U.S. Br. at 19-20, the Government proposes an exception that would convert Hughes' bright-line rule into a "functional test." *Id.* at 22. Disclosure to a member of the public qualifies as a "public disclosure," the Government asserts, only insofar as "that person is under no *duty* not to reveal the information to others." *Id.* at 19 (emphasis added). The United States fails, however, to explain either the source or the nature of this "duty." Is it a *legal* duty? If so, does it arise out of federal law, state law, or contract? Is it a *moral* duty? Does it depend, as the United States implies, on the "understanding" of the person to whom the disclosure is made? *Id.* at 21.[11]

[11] Schumer candidly admits that, under his similar fallback argument, no "public disclosure" takes place when the Government discloses information to members of the public who "may well *feel* a duty—*or at least a sense*—of loyalty to their employer." Resp. Br. at 33 (emphasis added). Such a "feeling"-based analysis, however, involves the application not of law but of pop psychology.

These questions have no answer because the United States' "duty" requirement is made up out of whole cloth. The Government makes no pretense that the requirement has any basis in the statute's text or history, and the requirement does not remotely correspond with what the Government itself identifies as the *qui tam* bar's purpose of precluding private enforcement actions where the Government has launched investigatory or enforcement efforts, *see* U.S. Br. at 19-20 n.12 (quoted *supra* note 7).[12] Indeed, the law recognizes no "duty" to conceal evidence of fraud. *See, e.g.,* Restatement (Second) of Agency § 395 cmt. f (1958). To the contrary, the law has long imposed an affirmative duty to *report* such evidence. *See, e.g., Roberts v. United States,* 445 U.S. 552, 557-58 (1980); *Branzburg v. Hayes*, 408 U.S. 665, 696-97 (1972). The whole point of the FCA's *qui tam* enforcement mechanism, of course, is to encourage private parties to fulfill that duty.[13]

[12] Although the United States purports to base its analysis on the existence *vel non* of a "duty" not to disclose information, its conclusion appears to rest on the *factual* premise that the disclosures in this case were made only to "the company itself," rather than to "the individual employees *qua* individuals." U.S. Br. at 21. That premise is baseless. When conducting the audits and investigation in this case, the Government did not contact "the company" in the abstract, but instead communicated directly with numerous Hughes employees. *See, e.g.,* Pet. Br. at 8; J.A. at 48, 50-53, 64, 106-07, 132, 165-75. There is nothing in the record to suggest that Hughes limited the Government's contacts to a few select individuals "designated by Hughes management." U.S. Br. at 20. To the contrary, much of the information disclosed to the employees was not restricted either by the Government or by Hughes. *See, e.g.,* J.A. at 163-64, 168. (Indeed, Hughes placed *in the company library* its internal "contact report" detailing the allegations at issue. *See* J.A. at 54.) It is worth noting, in this regard, that the *qui tam* bar applies regardless of *who* makes the relevant "public disclosure," as long as the "facts or allegations" disclosed are from one of the specified sources—*i.e.,* the *Government* need not make the disclosure.

[13] Thus, the FCA not only offers "whistleblowers" a potentially lucrative *qui tam* recovery, but allows them to keep confidential the information reported, *see* 31 U.S.C. § 3730(b)(2), and protects them against retaliation, *see id.* § 3730(h).

III. SCHUMER'S INTERPRETATION OF "FALSE CLAIM" IS WRONG.

A. On the merits, Schumer insists that his challenge to Hughes' *disclosure* of its accounting practices presents a genuine issue of material fact under the FCA even though his challenge to those accounting practices themselves does not. *See* Resp. Br. at 39-47. Again, he is wrong.

1. Schumer's argument is most notable for what it does *not* say. Schumer makes no effort to defend the Ninth Circuit's holding that "the lack of a determination of actual harm from [noncompliance with disclosure obligations] does not preclude a claim under the FCA." Pet. App. at 25a (citing *Rex Trailer Co. v. United States,* 350 U.S. 148, 152 (1956), and *United States v. Kensington Hosp.,* 760 F. Supp. 1120, 1127 (E.D. Pa. 1991)). That holding ignores the basic distinction between "damages" and "injury." To say (as this Court did in *Rex Trailer*) that alleged misconduct falls within the FCA's scope regardless of whether a plaintiff can prove "specific damages" is not to say that such misconduct falls within the FCA's scope regardless of whether it is capable of causing *injury* to the public fisc. The FCA does not proscribe any and all statutory, regulatory, or contractual infractions by a government contractor. An alleged infraction simply does not entail a "false claim" if—at the very least—it does not entail a request for government money or property to which the claimant is not entitled. And without a "false claim," of course, there can be no liability under the FCA.

2. In contrast to the Ninth Circuit, Schumer purports to recognize that an infraction falls within the FCA's scope only if it involves a "claim" for government money or property. *See* Resp. Br. at 45. That is correct, as far as it goes. But the relevant "claim," in addition, must be "false" or "fraudulent." *See* 31 U.S.C. § 3729(a)(1), (2). As a matter of law and logic, a "claim" cannot be deemed "false" or "fraudulent" if the claimant is entitled to the money or property requested. *See* Pet. Br. at 38, 43. The disclosure deficiencies alleged here,

accordingly, are not actionable under the FCA for the simple reason that they did not lead Hughes to request a single penny from the Government to which it was not entitled. *See, e.g., Brunswick Bank & Trust Co. v. United States,* 707 F.2d 1355, 1365 (Fed. Cir. 1983); *cf. United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama,* 1997 WL 21259, at *6-*9 (4th Cir. Jan. 22, 1997). Indeed, it is silly to suggest that the untimely disclosure of accounting practices can result in a "false claim" where, as here, those accounting practices were not only proper but actually *saved* the Government money.

Schumer, however, declares that an accounting disclosure infraction is *always* actionable under the FCA because a government contractor must, as a "condition of contracting," disclose its accounting practices to the Government. *See* Resp. Br. at 45-46 (citing 41 U.S.C. § 422(h)(1)(A)). Accordingly, Schumer suggests that Hughes' alleged noncompliance with its accounting disclosure obligations defeated the company's "eligibility" for a government payment. *Id.* at 10, 39.

That suggestion is nonsense. It is indeed true that a contractor cannot enter into a major government contract without first filing a disclosure statement describing its accounting practices.[14] Hughes complied with that requirement by filing an accurate disclosure statement prior to the award of the subcontracts at issue here. *See* Pet. App. at 25a, 42a. It is also true that a government contractor must amend its disclosure statement whenever it alters its accounting practices during performance of a contract.[15] It is *not* true, however, that a delay in amending an accounting disclosure statement renders a contractor "ineligible" for payment. To the contrary, under

[14] *See* 41 U.S.C. § 422(h)(1)(A); 48 C.F.R. § 9903.202-1(b). During the relevant time period here, this requirement was set forth at 50 U.S.C. App. § 2168(h)(1) (1982) and 4 C.F.R. § 351.40(b)(1) (1982).

[15] *See* 48 C.F.R. §§ 9903.201-4(a)(a)(2) & 9903.202-3. During the relevant time period here, this requirement was set forth at 4 C.F.R. §§ 331.50(a)(2) and 351.120 (1982).

established law, the failure to amend such a statement affects the Government's payment obligations only insofar as the improperly disclosed accounting practice itself inflates the Government's costs.[16] Accordingly, where (as here) the underlying accounting practices are entirely proper, any delay in amending an accounting disclosure statement does not affect a contractor's entitlement to payment. That is precisely why the Government's Contracting Officer in this case released the previously withheld $15.4 million in payments with full knowledge of the alleged disclosure noncompliance. *See* J.A. at 136-37; Pet. App. at 67a-68a.[17]

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[16] *See* 41 U.S.C. §§ 422(h)(1)(B) & (h)(3); 48 C.F.R. §§ 30.602-2(d) & 9903.201-4(a)(a)(5); *cf.* 48 C.F.R. § 9903.303(a). During the relevant time period here, these provisions were set forth at 50 U.S.C. App. § 2168(h)(1) (1982) and 4 C.F.R. §§ 331.71(b), 331.50(a)(5), and 351.100 (1982).

[17] Both Schumer and the United States attempt to downplay the implications of the Contracting Officer's decision to pay Hughes in full under the contract. *See* Resp. Br. at 45-46 n.29; U.S. Br. at 30. The Officer's decision is not conclusive on the "allowability" of Hughes' costs, they assert, because (1) it lacks the formal characteristics of a "decision" under the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, (2) Schumer has alleged "fraud," and (3) the Officer expressly reserved the Government's right to share in any *qui tam* recovery. They are wrong on all counts. *First,* the Officer's decision in the contractor's favor binds the Government regardless of whether it complies with all of the CDA's formalities. *See* J. Cibinic & R. Nash, *Administration of Government Contracts* 1298 (3d ed. 1995). *Second,* the Officer's decision here was made with full knowledge of the underlying allegations of wrongdoing; there is no allegation of fraud *on the Officer* to vitiate that decision. *See, e.g., Chrysler Corp.*, ASBCA No. 17,259, 75-1 BCA (CCH) ¶ 11,236, at 53,491 (Apr. 30, 1975). *Third,* the Officer's boilerplate reservation of the Government's FCA rights did not alter the legal significance of his decision to pay under the contract; that decision necessarily implied a determination that all costs were "allowable." *See, e.g.,* J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1105 (2d ed. 1993). In any event, Hughes' petition for *certiorari* was based on the factual premise that the wrongdoing alleged by Schumer did not result in any "unallowable" costs but actually *saved* the Government money. *See* Pet. Cert. at 20-22 & n.7. Schumer's brief in opposition did not contest that premise, but instead argued that cost

(continued...)

Schumer is thus ultimately reduced to arguing that an alleged disclosure violation is actionable under the FCA *regardless* of whether, in any particular case, it results in an inflated request for payment. *See* Resp. Br. at 47. This is so, Schumer asserts, because accounting disclosure requirements "serv[e] to protect the Government's fiscal interests *in the long run.*" *Id.* (emphasis added). Under that remarkable theory, *any* infraction by a government contractor (no matter how technical) is apparently actionable under the FCA if it can be said to affect the public fisc in some general sense.[18] Such an open-ended standard of liability would not only lead the FCA to swallow up a large chunk of contract law and the U.S. Code, *see* Pet. Br. at 40-41, but would itself injure the public fisc by making it harder (and more expensive) for the Government to find contractors willing to do business. *Cf. United States v. Winstar Corp.*, 116 S. Ct. 2432, 2459 (1996).[19]

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[17](...continued)

impact was simply irrelevant to FCA liability. *See* Opp. Cert. at 9-12. Accordingly, it is too late now for Schumer to challenge the underlying premise. *See, e.g., Lockhart v. Fretwell,* 506 U.S. 364, 371 n.4 (1993); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 466 n.10 (1992).

[18] The United States advances the related argument that *any* breach of contract—regardless of whether it involves injury to the public fisc—falls within the FCA's scope if it has any "bearing upon" a government contractor's entitlement to payment. *See* U.S. Br. at 25-28. Whatever the merits of that sweeping argument, *but see United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 848-51 (E.D. Va. 1995), it is beside the point. As explained in text, the disclosure infractions alleged here did *not* affect Hughes' entitlement to payment.

[19] Because he cannot defend the Ninth Circuit's holding that potential cost impact is irrelevant to FCA liability, Schumer attempts to pass it off as a non-dispositive "alternative holding." Resp. Br. at 39. He cannot, however, dodge the issue. To be sure, the Ninth Circuit also stated that Hughes' alleged disclosure deficiencies "may" have rendered unspecified costs "unallowable" within the meaning of a federal regulation. *See id.* (quoting Pet. App. at 25a). That statement is not only incorrect, *see supra* at 18 n.17, Pet. Br. at 43-44 n.26, but also irrelevant. The Ninth Circuit

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B. Finally, Schumer defends the Ninth Circuit's decision to address his allegation of improper disclosure to the Government notwithstanding his failure to raise that allegation in his complaint. *See* Resp. Br. at 47-49. Because he cannot defend the Ninth Circuit's reasoning, however, he simply distorts it.

1. Schumer's principal argument is that the Ninth Circuit erred as a *factual* matter by stating that he "did not allege these claims in his complaint." Pet. App. at 22a. That argument is not only baseless, but comes too late in the day to shield the Ninth Circuit's rule of mandatory *de facto* amendment from this Court's review. Schumer's brief in opposition to *certiorari* did not challenge the factual premise underlying the Ninth Circuit's application of its rule in this case. Accordingly, this Court should review the holding below "under the same factual assumptions" as the lower court. *Lucas v. South Carolina Coastal Comm'n,* 505 U.S. 1003, 1020 n.9 (1992).

2. As a fallback argument, Schumer asserts that the Ninth Circuit did not apply its established (but indefensible) rule of mandatory *de facto* amendment, but instead held only that the district court here had *discretion* (which it presumably abused) to address the allegations first raised in Schumer's brief in opposition to summary judgment. *See* Resp. Br. at 49 & n.32. That assertion is simply untrue. *See* Pet. App. at 22a-23a.

CONCLUSION

The judgment below should be reversed.

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[19](...continued)
authorized the imposition of liability under the FCA *regardless* of whether an alleged infraction had any impact on costs, "unallowable" or otherwise. *See* Pet. App. at 25a. Under that approach, the existence of "unallowable" costs might determine the availability of *damages*, but not the existence of *liability*. Indeed, Schumer himself adopts precisely this position. *See* Resp. Br. at 47 n.30.

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